



Billing Code: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2018-OS-0075]

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Interim final rule.

SUMMARY: In accordance with the Privacy Act of 1974, the Office of the Secretary of Defense is exempting records maintained in a new system of records, “Personnel Vetting Records System,” DUSDI 02-DoD, from certain requirements of the Act.

DATES: This interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, ATTN: Box 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Cindy Allard, Chief, Defense Privacy, Civil Liberties, and Transparency Division, 703-571-0070.

SUPPLEMENTARY INFORMATION:

BACKGROUND:

This Privacy Act system contains records that support DoD in conducting end-to-end personnel security, suitability, fitness, and credentialing processes, including submission of applications and questionnaires, investigations, adjudications, and continuous vetting activities. DoD developed the information technology capabilities that contribute to the Personnel Vetting Records System to support background investigation processes pursuant to Executive Order 13467, as amended, and Section 925 of the National Defense Authorization Act (NDAA) for FY2018.

The Personnel Vetting Records System integrates information technology capabilities to execute the conduct of background investigations actions including: investigations and determinations of eligibility for access to classified national security information, suitability for federal

employment, fitness of contractor personnel to perform work for or on behalf of the U.S. Government, and HSPD-12 determinations for Personal Identity Verification (PIV) to gain logical or physical access to government facilities and systems. The Personnel Vetting Records System also supports submission of adverse personnel information, verification of investigation and adjudicative history and status, continuous evaluation, and insider threat detection, prevention, and mitigation activities. Records in the information systems covered by this system notice may also be used as a management tool for statistical analyses; tracking, reporting, and evaluating program effectiveness; and conducting research related to personnel vetting.

Pursuant to subsections (k)(1)-(3) and (5)-(7) of the Privacy Act, these specific exemptions from subsections (c)(3), (d)(1)-(4), and (e)(1) of the Act are necessary to allow the Department to ensure that the personnel vetting process functions in a way that fosters efficient, fair, and effective identification, investigation, and adjudication of information for end-to-end adjudication of the whole person. If a process within the personnel vetting program indicates adverse action is anticipated, due process is provided to the subject of the record prior to a final decision by the Department.

GOOD CAUSE FOR ADOPTION WITHOUT PRIOR NOTICE AND COMMENT:

The Department is publishing this rule as an interim final rule in order to implement the program in a timely manner consistent with new mandates in the National Defense Authorization Act for Fiscal Year 2018. In accordance with Public Law 115-91, responsibility for the vetting of DoD personnel will begin to transfer from the Office of Personnel Management (OPM) to the Department of Defense effective October 1, 2018. OPM's conduct of background of investigation necessitated exemptions for its system of records covering such investigations. Similarly, DoD's full, immediate use of the records system and associated exemptions to carry

out the missions transferred from OPM are essential to mitigate the backlog of personnel investigations which is preventing tens of thousands of U.S. citizens from starting new employment and delaying the identification of issues of concern among the existing cleared population which places classified information and other personnel at risk. Accordingly, it is currently impractical, unnecessary, and contrary to the public interest to first publish this exemption rule for notice and comment before its implementation.

REGULATORY PROCEDURES:

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

It has been determined that this rule is not a significant rule. This rule does not (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive orders.

Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"

This rule is not significant under Executive Order 12866, "Regulatory Planning and Review." Therefore, the requirements of Executive Order 13771 do not apply.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C Chapter 6)

It has been certified that this rule does not have a significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act systems of records within DoD. A Regulatory Flexibility Analysis is not required.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

It has been determined that this rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that it will not significantly or uniquely affect small governments.

Executive Order 13132, “Federalism”

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—[AMENDED]

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Amend §310.30 by:

- a. Revising the first sentence of paragraph (b)(1).
- b. Redesignating paragraph (d) as paragraph (e).
- c. Revising newly redesignated paragraph (e)(1).
- d. Designating the undesignated paragraph following paragraph (e)(1) as paragraph (e)(1)(i).
- e. Adding paragraph (e)(1)(ii).
- f. Further redesignating newly designated paragraph (e)(2) as paragraph (d) and adding a heading for newly redesignated paragraph (d).
- g. Adding a new paragraph (e)(2).
- h. Further redesignating newly designated paragraphs (e)(3) introductory text and (e)(3)(i) through (xii) as paragraphs (e)(1)(iii) introductory text and (e)(1)(iii)(A) through (L), respectively, and further redesignating newly designated paragraph (e)(4) as paragraph (e)(1)(iv).
- i. Adding headings for newly redesignated paragraphs (e)(1)(iii) and (iv).

The revisions and additions read as follows:

§310.30 DoD-wide exemptions.

* * * * *

(b) *Promises of confidentiality.* (1) Only the identity of sources that have been given an express promise of confidentiality may be protected from disclosure under this section. * * *

* * * * *

(d) *Exempt records.* * * *

(e) * * * *

(1) *System identifier and name.* DUSDI 01-DoD “Department of Defense (DoD) Insider Threat Management and Analysis Center (DITMAC) and DoD Component Insider Threat Records System.”

(i) *Exemption.* This system of records is exempted from subsections (c)(3) and (4); (d)(1), (2), (3) and (4); (e)(1),(2),(3),(4)(G)(H)and (I),(5) and (8); and (g) of the Privacy Act.

(ii) *Authority.* 5 U.S.C. 552a(j) (2) and (k)(1), (2), (3), (5), (6), and (7).

(iii) *Exemption from the particular subsections.* * * *

(iv) *Exempt records from other systems.* * * *

(2) *System identifier and name.* DUSDI 02-DoD “Personnel Vetting Records System.”

(i) *Exemption.* This system of records is exempted from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), (d)(4), and (e)(1) of the Privacy Act.

(ii) *Authority.* 5 U.S.C. 552a (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)--(1) Exemption (k)(1).* Personnel investigations and vetting records may contain information properly classified pursuant to Executive Order.

Application of exemption (k)(1) for such records may be necessary because access to,

amendment of, or release of the accounting of disclosures of such records could disclose classified information that could be detrimental to national security.

(2) *Exemption (k)(2)*. Personnel investigations and vetting records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or counterintelligence investigation, and thereby seriously impede law enforcement or counterintelligence efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties, civil remedies, or counterintelligence measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(3) *Exemption (k)(3)*. Personnel investigations and vetting records may contain information pertaining to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the safety of the individuals protected pursuant to 18 U.S.C. 3056 and compromise protective services provided to the President and other individuals. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(4) *Exemption (k)(5)*. Personnel investigations and vetting records may contain investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(5) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government, could hinder the Government's ability to obtain information from future confidential sources, and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(5) *Exemption (k)(6)*. Personnel investigations and vetting records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(6) *Exemption (k)(7)*. Personnel investigations and vetting records may contain evaluation material used to determine potential for promotion in the armed services. In some cases, such records may contain information pertaining to the identity of a source who furnished information

to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(7) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government, hinder the Government's ability to obtain information from future confidential sources, and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(B) *Subsections (d)(3) and (4)*. These subsections are inapplicable to the extent an exemption is claimed from (d)(1) and (2). Moreover, applying the amendment appeal procedures toward background investigation and vetting records could impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(C) *Subsection (e)(1)*. In the collection of information for authorized vetting purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required suitability, eligibility, fitness, and credentialing determinations. Accordingly, application of exemptions (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7) may be necessary.

(iv) *Exempt records from other systems*. In addition, in the course of carrying out personnel vetting, including records checks for continuous vetting, exempt records from other systems of

records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained into this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the original primary system of which they are a part.

Dated: October 11, 2018.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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